

DOCUMENT RESUME

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[Alleged Irregularities in Procurement of Cold Storage Equipment]. B-188659. August 9, 1977. 8 pp.

Decision re: Austin-Campbell Co.; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).

Contact: Office of the General Counsel: Procurement Law I.

Budget Function: National Defense: Department of Defense - Procurement & Contracts (058).

Organization Concerned: Department of the Navy; Stopher Mechanical Co.

Authority: B-188764 (1977). B-188387 (1977). B-185755 (1977).

B-176745 (1973). B-189136 (1) (1977). B-187671 (1977).

B-179723 (1974). B-182921 (1975). A.S.P.R. 1-905.4 (b).

A.S.P.R. 1-902. 37 Comp. Gen. 524. 46 Comp. Gen. 281. 53 Comp. Gen. 838.

The protester alleged a number of irregularities in the procurement of cold storage equipment and requested a ruling requiring the Navy to terminate the existing contract. The contract was impossible to perform and may be modified to permit delivery of equipment which is noncompliant with the invitation. The second low bidder's claim for bid preparation costs was denied. (Author/SC)

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KLEMAN
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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

FILE: N-183659

DATE: August 9, 1977

MATTER OF: Austin-Campbell Co.

DIGEST:

Contract is modified as impossible of performance to permit delivery of equipment noncompliant with invitation. Second low bidder's claim for bid preparation costs is denied: (1) agency neither knew nor should have known before award that equipment was commercially unavailable since 10 of 11 vendors indicated compliant bids would be submitted and record does not evidence oral specification waiver; (2) low bid was responsive; (3) preaward survey was unnecessary since awardee was contacted vendor; (4) low bid approximated Government estimate and was only 16 percent below highest bid; and (5) prebid-opening letter from supplier of equipment protester would have furnished indicates noncompliance.

The Department of the Navy (Navy) issued invitation for bids (IFB) N62864-76-B-1074 for the procurement of cold storage equipment. Prior to bid opening, vendors were queried concerning their understanding of the technical specifications, including specifically the requirement for compressors with a piston speed of 875 fpm or less. The specifications also required that the compressor have a direct drive 1750 rpm motor. Ten vendors indicated that they could meet the requirements and would bid. Bids were opened with the following results:

Stopher Mechanical Co.	\$179,469
Austin-Campbell Co.	212,305
Quality Refrigeration	217,209
Aronousky & Associates	217,997
York Division, Borg Warner	220,103

By letter dated the day of bid opening, Austin-Campbell Co. (Austin-Campbell) suggested to the Navy that it conduct a preaward survey because the low bidder, Stopher Mechanical Co. (Stopher), may have bid nonconforming compressors. The next day and prior to receipt of Austin-Campbell's letter, the Navy awarded Stopher the contract after noting the spread between the two low bids and obtaining confirmation from the low bidder, whose bid was in close proximity to the Government estimate (\$177,330).

After receiving Stopher's shop drawings about 1 month after award, the Navy concluded that the compressors offered could only meet the 875 fpm requirement if the motors operated at 1170 rpm which would have been in derogation of the specification motor speed of 1750 rpm. The Navy contacted compressor manufacturers in an attempt to ascertain if compliant compressors were commercially available. The compressor manufacturers informed the Navy that in view of the interdependent requirements of piston and motor speed, they could not provide compliant compressors. Since commercially available compressors could not meet Government specifications, the Navy determined that the specifications were impossible of performance. Accordingly, the Navy modified the specifications so Stopher could provide compressors with a 1000 fpm nominal piston speed, at no change in contract price.

Austin-Campbell contends that there were a number of irregularities in the procurement.

The Navy had sufficient reason to know prior to award that Stopher's bid was based on less expensive and noncompliant equipment because of Stopher's unreasonably low bid and the notice of that fact from Austin-Campbell. The Navy's cost estimate had to be based on noncompliant equipment, since the Navy knows of no compressors that can meet the specifications. Consequently, a bid price, such as Stopher's, that approximated the Navy's estimate should have been suspect. Despite this, the Navy failed to conduct a preaward survey and awarded the contract to an unknown and nonresponsive bidder within 24 hours after bid opening rather than to Austin-Campbell which can supply compliant equipment. According to the protester, a Navy representative other than the contracting officer informed Austin-Campbell and other vendors that compressor models 5F-86 and 5F-126 which are manufactured by Carrier International Corporation (Carrier) did not meet specifications and would be rejected; however, York compressors, even though their motors ran at 1140 rpm and not at the specified 1750 rpm, would be acceptable. The Navy representative stated further that no amendment to this effect would be necessary or forthcoming. Had the Navy supplied this information to Stopher, the Stopher bid based on Carrier would have been withdrawn. Further, if Austin-Campbell had been permitted to bid these noncompliant compressors, its bid price would have been lower than the contract price.

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The Navy should have terminated Stopher's contract for default rather than amend the specifications. The amendment is unwarranted and discriminates in favor of a nonresponsive bidder, which has no excuse for not providing cold storage equipment at the contract price.

Based on the foregoing, Austin-Campbell requests that the GAO issue a ruling whereby the Navy would be required to terminate the contract with Stopher and award the contract to Austin-Campbell, or issue a ruling requiring the Navy to reimburse Austin-Campbell for certain unspecified costs incurred, apparently including bid preparation costs, and anticipated profit.

The Navy states that responsiveness is based on the four corners of the bid document, and there is no basis for determining that Stopher's bid was nonresponsive. Although Stopher's bid price was \$32,863 less than the next low bid, the price was very close to the Navy's estimate. According to the Navy, the estimate was based on data from its engineering library plus escalation factors and information from bidders of similar equipment. Moreover, there was no reason to suspect at the time of award that the estimate might be incorrect. However, in view of the price differential, Stopher was requested to and did verify the bid. The Navy also states that it was not necessary to conduct a preaward survey since prebid discussions had been held with Stopher, and Stopher bid without exception.

With regard to Austin-Campbell's allegation that the Navy orally waived specifications, and it could have supplied complete cold storage equipment, the Navy states that no oral waivers were given, and the equipment which Austin-Campbell indicated it would have supplied did not comply with the specifications set forth in the IFL.

Finally, the Navy alleges that there was never any reason to terminate Stopher's contract for default. In any event, all cold storage equipment required by the contract has been delivered, and there are no grounds for awarding Austin-Campbell costs and anticipated profit.

According to the Navy, Stopher has performed the contract. As a practical matter, we will limit our consideration to Austin-Campbell's request for bid preparation costs. Anticipated profits are not recoverable against the Government, even if a claimant is wrongfully denied a contract. Robert Swartzel, B-188764, April 22, 1977, 77-1 CPD 280.

Essentially, bid preparation costs will be allowed where the Government acted arbitrarily or capriciously with respect to a claimant's bid or proposal. The underlying rationale is that every bidder or offeror has the right to have its bid honestly considered by the Government, and if that obligation is breached, and a bidder is therefore put to needless expense in preparing a bid, the bidder or offeror is entitled to recovery of expenses. Morgan Business Associates, B-182387, May 10, 1977, 77-1 CID 344. Mere negligence, however, by the procuring activity is generally not sufficient to support a claim for bid preparation costs. Groton Piping Corporation and Thames Electric Company (Joint venture) - Claim for Bid Preparation Costs, B-185755, June 3, 1977, 77-1 CPD 389.

The principal issue to be decided is whether the Navy knew or should have known prior to award that the specified equipment was not available and, consequently, whether the Navy intended to modify the specifications shortly after award. In this regard, we held in A & J Manufacturing Company, 53 Comp. Gen. 638 (1974), 74-1 CPD 240, that:

"* * *It is true that under the contract 'Changes' clause the contracting officer has the right to make changes to the specifications which are within the general scope of the contract and to adjust the price equitably if the cost of performance is affected. B-176745, May 10, 1973. However, the competition to be achieved in the award of Government contracts must be held to the work actually to be performed. Thus, a contracting officer may not award a contract competed under a given specification with the intention to change to a different specification after award. Otherwise, a major purpose of the Federal procurement system would be thwarted. Cf. 37 Comp. Gen. 524 (1958); 46 id. 281 (1966).

"The short period between contract award * * * and the amendment inevitably gives rise to questions concerning the possibility that the change was contemplated prior to award * * *"

As noted, 10 vendors indicated during prebid discussions that they could meet specifications. Carrier, which was contacted 3 days prior to opening, however, indicated that it could not meet the specified 875 fpm piston speed limitation, inter alia, and would not bid, which was confirmed by letter of the same date to the Navy. Carrier also stated that the specifications had apparently been "selected around" Carrier equipment and suggested the Navy review other manufacturers' products to insure compliance with specifications.

While it can be argued that the Navy should have been put on notice that compliant equipment may have been difficult or impossible to obtain since the specifications were apparently based on Carrier equipment and Carrier indicated that it could not bid, 10 other vendors stated that they would bid without exception. Three of these vendors, including Austin-Campbell, had been contacted on two occasions and affirmed that they could meet specifications.

With respect to the alleged oral waiver, the Navy denies that any oral waiver was granted. Paragraph 3 of Standard Form 33A, Instructions and Conditions, included in the IFB, specifically states that oral explanations given before award of a contract are not binding. Bidders, then, assume the risk by relying on oral advice provided prior to award. Deere & Company, B-189135(i), June 28, 1977, 77-1 CPD 460. Moreover, there is no indication in the record that the Navy modified or waived specifications prior to award. No written amendment was issued to the specifications prior to bid opening. Also, Carrier makes no mention in its prebid-opening letter that the Navy had waived the 1750 rpm requirement. Also the record shows that subsequent to award, the Navy cabled the requiring activity requesting the name of a source which could supply compliant equipment and apparently continued to believe that compliance was possible.

Based on the foregoing, it appears that the Navy had reason to believe and did in fact believe, both prior to award and for some time thereafter, that the specified equipment was available. Consequently, we cannot conclude that, prior to award, the Navy had any intention of changing the specifications shortly after award.

As for the award to Stopher, that firm bid without exception, and where, as here, a bidder takes no exception to the requirements of the IFB, we have held that the bid is responsive on its face, even though a determination is made after award that the bidder will not supply what the government required. Such determination goes to the bidder's responsibility and not to the responsiveness of the bid. Government Contractors, Inc., - Reconsideration, B-127571, March 3, 1977, 77-1 CPD 159.

Even though Stopher's bid was responsive, a contract could not have been awarded to Stopher until the contracting officer, pursuant to ASPR § 1-902 (1976 ed.) and § 1-904.1 (1976 ed.), found Stopher to be responsible. Cal-Chem Cleaning Company, Incorporated, B-179723, March 12, 1974, 74-1 CPD 127. In making the determination that Stopher was responsible, we can understand the reason why the contracting

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officer did not consider a preaward survey necessary because Stopher indicated during prebid discussions that it could provide compliant equipment which, at that time, as we have concluded above, was a reasonable assumption. With respect to the contracting officer's determination, ASPR § 1-905.4(b) (1976 ed.) provides that a preaward survey is required only when the information available to the procuring activity is not sufficient to enable the contracting officer to make a determination regarding the responsibility of a prospective contractor. Under the circumstances, we cannot find that the contracting officer's determination not to request a preaward survey was arbitrary or capricious.

Although Austin-Campbell alleges that it orally informed a Navy representative at bid opening that Stopher's low bid indicated an intention to supply less expensive and noncompliant equipment, we note that Stopher's bid price of \$179,469 was very close to the Navy's price estimate of \$177,330 which was based on data from the Navy's engineering library, plus escalation factors, and information from bidders of similar equipment. Accordingly, the Navy considered Stopher's bid price to be reasonable. In this regard, we have held that the determination of whether a bid price is reasonable is the responsibility of the procuring activity and the determination will not be disturbed by this Office unless arbitrary and capricious. Noris Industries, B-182921, July 11, 1975, 75-2 CPD 31. We also note that the Stopher's bid was only 16 percent below the highest bid received. There is no evidence of record which indicates that the Navy arbitrarily or capriciously determined that Stopher's bid price was reasonable.

As far as impossibility is concerned, the Navy contends that the contract was impossible of performance, and the equipment which Austin-Campbell would have supplied does not meet specifications. More specifically, Austin-Campbell indicated that it would have provided Carrier duplex compressor units, i.e., a single electric motor driving two separate compressors. According to the Navy, the specifications do not permit either literally or by implication the use of duplex units. The Navy also contends that Carrier agreed that the specifications require a single compressor, since Carrier stated that its equipment could not meet specifications.

Austin-Campbell, on the other hand, contends that the specifications do not prohibit the use of duplex units, and Carrier never stated that the specifications require a single compressor. In fact, Carrier allegedly told Austin-Campbell prior to bid opening that it did meet specifications with the duplex units. According to Austin-Campbell, the only reason Carrier did not bid the duplex unit is that Carrier felt that the duplex

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unit was not competitively priced with regard to the York unit which the Navy had told Carrier would be acceptable. Austin-Campbell states further that Carrier manufactures a single compressor unit that fulfills all the specifications of item 0002, and Carrier's duplex units also meet the specifications for items 0001 and 0003.

The Carrier letter stated in pertinent part that:

"We are in receipt of the subject solicitation for proposal to cover certain cold storage equipment.

"While this solicitation covers equipment which has apparently been selected around Carrier equipment, at least in part, we are unable to comply with the letter of the specifications. We must assume that these discrepancies are due to human element. Nonetheless, since we cannot comply with the letter of the specifications, we must decline to bid this specific project.

"While the areas of deviation from specifications have been discussed with your * * * [Navy representative] it is appropriate that I restate them herein. The specific items of deviation are relative to the compressors, paragraph 2.3, wherein piston speed for the selected compressor should be slightly over 1000 fpm. Paragraph 2.3.1 spells out capacity per compressor duty, which does reflect that from our 5F, H catalog, but does not include the deration for other than maximum possible actual gas temperature. It is for these reasons only that we are unable to bid on this particular project. We would suggest you review other manufacturers' offerings for this project to also insure compliance on these points."

This tends to support the Navy's contention that the contract was impossible of performance. Of particular significance, Carrier, the supplier of the equipment which the protester says is compliant, specifically gives a clear indication of noncompliance. We view this as very persuasive contemporary evidence. Considering Carrier's letter and the post-award statements by manufacturers of cold storage equipment that compliant equipment was not commercially available, we cannot find that the Navy improperly modified the contract with Stopher to the derogation of Austin-Campbell's rights as a competitor for the contract.

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We recognize that the indications in the Carrier letter to support impossibility of performance impact also on the prebid-opening Navy knowledge regarding the availability of compliant equipment. Also the record fails to explain the inconsistencies between the before-and-after bid opening statements of vendors relating to specification compliance. However, the circumstances viewed in their entirety do not reach the requisite level for granting Austin-Campbell's claim for bid preparation costs.


Deputy Comptroller General
of the United States